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SUPREME COURT, U.S.
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No. 89-1735

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOHN POZSGAI

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## REPLY BRIEF OF PETITIONER

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## REPLY BRIEF FOR PETITIONER

In a radically different brief from the one it filed below, the respondent has now all but confessed error when it concedes that no direct evidence was introduced at trial to prove the twin jurisdictional elements of the offense; admits that it misrepresented to the court of appeals what the aerial photographs depicted when it falsely asserted below that they show the stream on petitioner's property flowing into the Pennsylvania Canal; concludes that the "record is admittedly quite thin" with respect to jurisdiction; and suggests that the trial court mistakenly imposed the $200,000 fine. Opp. 8 n.4, 9 n.6, 12, 17. Under these circumstances, where the conviction was affirmed on the basis of a misrepresentation of the only evidence as to an element of the offense, at a minimum, the judgement should be vacated and the case remanded. *See Alvarado v. United States*, 58 U.S.L.W. 3815 (June 25, 1990). Indeed, summary reversal would even be appropriate since there was no evidence of jurisdiction. Alternatively, this case is worthy of this Court's plenary review.

1. The respondent argues for the first time in this Court that despite the lack of any direct evidence, the jury could have nevertheless "reasonably infer[red]" that the stream on petitioner's property "flowed. . . into the Canal" because the stream allegedly entered a culvert near Route 1 and because the photographs show that the "Canal [is] just south of Route 1." Opp. 9. However, the photographs (Pet. App. 42a-45a) show that the Canal is still quite a distance from Route 1, being separated by a large lumber yard. Additionally, there is another dark line running directly parallel to and on the immediate south side of Route 1 which is another waterway, suggesting that petitioner's stream--if it did exit in this area as the respondent suggests--is a

tributary of that other stream (thereby defeating jurisdiction) rather than a tributary of the Pennsylvania Canal. Even more importantly, the respondent does not dispute petitioner's contention (Pet. 13) that there is no discernible dark line on the photographs leading to the Canal showing that *any* stream flows into it. No jury could conclude beyond a reasonable doubt from these photographs that the stream from petitioner's property flows into and hence, is a tributary of the Canal.

Even if the respondent is correct that on this "admittedly quite thin" record that the jury could infer this key jurisdictional fact, there is simply nothing in the record from which the jury could infer the second requisite jurisdictional element: that the Pennsylvania Canal was used for shipping in interstate commerce.

The respondent concedes that no direct evidence was introduced regarding the historical use of the Canal in interstate commerce. Nevertheless, the respondent now argues for the first time that "[A]s a matter of historical fact, the Pennsylvania Canal was used in interstate commerce" from 1832 to 1931 between "Pennsylvania Lehigh Valley and markets in eastern Pennsylvania and southern New Jersey," citing two texts which allegedly support that proposition. Opp. 10. Accordingly, respondent claims that the "court of appeals could properly take judicial notice of the Canal's use in interstate commerce, even though the district court did not do so," and implicitly suggests that were this case remanded to the court of appeals, this fatal defect in the government's case could be so cured. *Id.* This argument comes much too late. A court of appeals cannot take judicial notice in an appeal of a criminal case tried by a jury. *United States v. Jones*, 580 F.2d 219 (6th Cir. 1978) (court of appeals may not take judicial notice in criminal case that South Central Bell Telephone is a common carrier used to transmit

interstate communications).[1] Thus, the use of the historical theory of interstate commerce is foreclosed.

To salvage its case, the respondent advances an alternative theory of jurisdiction for the first time in this case, namely, that the jury could have concluded beyond a reasonable doubt that the Canal is "susceptible to use in [1] interstate . . . [2] commerce" as provided by 33 C.F.R. 328.3(a)(1), by merely gazing at the aerial photographs. This "susceptibility" theory remains just that, an unproven, unsupported theory.

To prove the shipping or "commerce" prong of this

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[1] Fed. R. Evid. 201(g) provides that "[i]n a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Since the trial court did not take judicial notice of the historical use of the Canal, no such instruction was given the jury.

In any event, it is doubtful that the historical use of the Canal in interstate commerce can be judicially noticed by any court based upon the sources cited in the respondent's brief. To support its contention that the Canal was "a shipping route between Pennsylvania Lehigh Valley and markets in . . . southern New Jersey," and hence, used in interstate commerce, the respondent cites (Opp. 10) R. McCullough & W. Leuba, *The Pennsylvania Main Line Canal* 80-82, 166-167 (1962). Yet that source states only that the 60-mile Canal ran from Easton to Bristol, Pennsylvania, serving "almost entirely as a coal carrying link between the Lehigh Canal and the Philadelphia market." *Id.* at 80. There is no mention of any commerce or shipping routes to "southern New Jersey" or to any other state. While the source notes that some canals interlocked with canals from other states, *id.* at 81, the particular Canal *sub judice* is not listed as one of them. Respondent's other source, C.P. Yoder, *Delaware Canal Journal* (1972), is similarly bereft of any discussion of the Canal's use as a shipping route to markets in southern New Jersey. Under the pertinent provision of Fed. R. Evid. 201(b), a trial court can take judicial notice of only those facts "capable of *accurate and ready determination* by resort to sources whose accuracy cannot reasonably be questioned." *Id.* (emphasis added). The respondent's sources hardly qualify as ones from which an "accurate and ready determination" can be made as to this Canal's use as an *interstate* waterway.

theory of jurisdiction, the respondent makes the preposterous claim that a jury could "reasonably infer that the Canal" is susceptible to use in interstate commerce because the "photographic evidence . . . showed that the Canal was a *substantial waterway* that *obviously* could have handled *shipping traffic* at one time," Opp. 9 (emphasis added), and therefore, could handle such traffic tomorrow. There is nothing "obvious" about it at all. The Canal is depicted on the aerial photographs as a thin dark line (not to be confused with the Delaware River, which is spanned by three bridges; Pet. App. 41a), hardly a "substantial waterway." And even if the jury could conclude from the perceived width of the Canal in the photograph that it was a "substantial waterway," that says nothing about the waterway's capability for handling shipping traffic. *See, e.g., Nebraska v. Wyoming*, 325 U.S. 589, 591, 593 (1945) (North Platte River, a substantial waterway, is a "non-navigable stream" which is "sometimes characterized as a river 'two miles wide and one inch deep.'").

To prove the second prong of the "susceptibility" theory of jurisdiction, *i.e.*, that the Canal is susceptible to interstate as opposed to intrastate commerce, the respondent argues that the jury could find that the Canal "had actually been used in interstate commerce" merely because one of the aerial photographs (Gov't Exh. 1; Pet. 41a) shows that the Canal "ran toward the New Jersey border" (Opp. 9 n.7). This contention is not only more farfetched than the argument for the first prong of this theory, but it is also fictional since the respondent's historical materials say nothing about any New Jersey shipping routes along this Canal.

Assume that before the trial began in this case, the petitioner had stipulated to all the elements of the offense except jurisdiction. If one were to accept respondent's argument, its entire case would have consisted of introducing the photographs into evidence

with a witness declaring, "This is the Pennsylvania Canal." To suggest that a jury could find *beyond a reasonable doubt* from that tidbit of "evidence" that the Canal is susceptible to use in interstate commerce is nothing short of wishful thinking.[2]

In a final act of desperation to try to come up with *something* to fill the jurisdictional void in its case, the respondent invents yet a third theory, namely, that the mere testimony by two federal employees who qualified as experts in determining wetland characteristics of the site (one of whom admitted that he never set foot on petitioner's property, 1 Dec. 27, 1988, Tr. 32) and who suggested that sites which have such wetland characteristics are federally protected, is legally sufficient evidence to prove the two jurisdictional elements of the offense. This novel "*ipse dixit*" theory of jurisdiction, which was not raised in the court of appeals, clearly lacks merit. The burden is on the government to prove all elements of the offense beyond a reasonable doubt.[3]

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[2] The Canal's "susceptibility" of use as a navigable waterway in interstate commerce is, in any event, a fanciful concept. The southern portion of the Canal has restricted water flow due to the collapse in 1950 of certain old aqueducts and the complete disappearance near Bristol of Locks Nos. 1, 2 and 3, the tidal basin (which has been filled in for a parking lot) and the tide lock. *See* C.P. Yoder, *Delaware Canal Journal* 235 (1972). Just east of petitioner's property where Route 1 intersects the Canal (Pet. App. 41a), the Canal is filled in completely where concrete beams support the Route 1 overpass. Under these circumstances, a court may take judicial notice that certain waterbodies once navigable but long closed to navigation are *not* "susceptible" to commercial traffic. *See Smith v. Hustler, Inc.*, 514 F. Supp. 1265, 1268-69 (W.D. La. 1981); *Loving v. Alexander*, 745 F.2d 861 (4th Cir. 1984).

[3] In context, these witnesses were testifying as to whether the site meets the federal definition of wetlands under 33 C.F.R. 328.3(b), not whether such wetlands fall within federal jurisdiction

(continued...)

In sum, the evidence is not merely "quite thin" on the jurisdictional elements of the offense, as even the government characterizes its own case, the evidence is simply not there. Any conclusion by the jury regarding jurisdiction, assuming it even made one, would not be based on the sufficiency of the evidence, but on rank speculation. This case is thus appropriate for summary disposition on the merits under Sup. Ct. R. 16.1.

2. Even if the evidence were sufficient to establish federal jurisdiction over petitioner's site, the petition raises an important and fundamental question that has nationwide impact: the meaning of the word "pollutant" as defined in the Clean Water Act, 33 U.S.C. 1362(6). In its opposition, the respondent does not dispute the importance of this issue; rather, the respondent makes a feeble attempt to argue on the merits that the discharge of topsoil and fill material onto wetlands constitutes a discharge of "pollutants" into "water" "as those terms are used in the Clean Water Act." Opp at 13. However, "pollutant" is defined in the Act as "dredged spoil, . . . rock, sand, cellar dirt . . . discharged *into water*." 33 U.S.C. 1362(6) (emphasis added). Not surprisingly, the respondent conveniently truncates the statutory definition of "pollutant" by omitting the key phrase "into water." Opp. 12.[4]

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[3](...continued)
under 33 C.F.R. 328.3(a). Respondent's claim that it necessarily had jurisdiction over the site because federal witnesses were testifying is consistent with the Corps of Engineers' penchant for regulating all wetlands regardless of whether jurisdiction exists. *See, e.g., Tabb Lakes, Ltd. v. United States*, No. 89-2905 (4th Cir. 1989); Brief of *Amici Curiae* Fercom Aquaculture, Inc., et al.

[4]It is true that another statutory phrase, "discharge of a pollutant," is defined as "any addition of any pollutant to navigable waters from any point source" and that this Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) upheld a (continued...)

The respondent cites no legislative history or agency regulation that is contrary to petitioner's position.[5] Because this is a pure (and simple) question of law involving the plain meaning of a term of common usage which has not been otherwise defined by any agency regulation, questions of deference to agency expertise are not implicated. The Court should resolve this issue not only because the respondent's position is so contrary to this Court's teachings on statutory interpretation, but also because the Corps of Engineers and the EPA have begun a nationwide campaign of regulating even "dry" wetlands. *See* Brief *Amici Curiae* of Fercom Aquaculture, et al.

3. The respondent does not dispute the importance of the Sentencing Guideline issue presented in this case. Nor does respondent deny that the draconian sentence imposed here is not only grossly disproportionate to pre-Guideline sentences for environmental offenses, but also to post-Guideline cases as well (including some sentences for arson, drug dealing, and other serious crimes), a result contrary to the intent of Congress which enacted the Sentencing Reform Act of 1984. (Pet. 22-29). Instead, respondent argues on the merits that nothing is amiss with Section 2Q1.3 of the Guidelines

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[4](...continued)
portion of a Corps regulations extending the definition of "navigable waters" to include certain wetlands. Nevertheless, the phrase "discharge of a pollutant" is still defined in terms of the word "pollutant" which in turn has only one statutory meaning, namely, certain substances discharged "into water," not "navigable waters" or "wetlands."

[5] The handful of district court cases cited by the respondent for the proposition that certain fill materials discharged into wetlands constitute "pollutants" under the Act, Opp. 13 n.9, are hardly persuasive authority, especially since none of the parties or the courts in those cases raised or addressed the "into water" portion of the definition, the precise question presented here.

that produces a 27-month sentence--the longest in U.S. history for *any* environmental crime--where the "crime" consisted of petitioner allowing topsoil and clean non-toxic, non-hazardous fill to be placed on his own property and where not a single fish, bird, or sea lion was killed, harmed, or threatened, and where indeed, the water in the stream adjacent to the site runs clearer today due to petitioner's clean-up efforts.[6]

In response to petitioner's argument that the environmental Guidelines are structurally flawed because they double-count both the base offense level and the aggravating factors, the respondent contends that the Commission's rationale was to have the base offense level for regulatory crimes "aimed at . . . recordkeeping or reporting offense[s]." Opp. 14, *citing* Sentencing Guidelines ch. 1, Pt. A, para. 4(f), at 1.9. Yet the Commission goes on to explain that the "*same failure* [to keep records or file reports] * * * may have led to substantive harm," warranting the addition of points to the base level. *Id.* (emphasis added). If this is the logic of the sentencing scheme for regulatory offenses, it was quickly abandoned here. For as the respondent correctly notes, "petitioner was not convicted of slipshod recordkeeping or failing to obtain [or file] a necessary form." Opp. 14-15. Thus, petitioner was given 6 base offense points at the outset for what the Commission intended to be a "recordkeeping or reporting" violation when petitioner was never charged, nor could he be, with such a violation. He was then assigned 6 more

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[6] As former U.S. Sentencing Commissioner Michael Block aptly put it, "People who are filling up ditches on their own land may now end up in federal prison for 27 months. These people may be guilty of something, but it isn't a heinous crime." *Reason*, May 1990 at 41. For reasons that have never been explained by respondent, the Corps of Engineers never issued any formal cease and desist order to petitioner, which, pursuant to their own regulations, would have warned him of the potential penalties. Pet. 5 n.3.

points for discharging a "pollutant" and 4 more for not having a permit, for a total of 16 points. Yet these two aggravating factors make up the totality of the "crime." No other Guideline category is structured in this bizarre manner which produces unduly harsh sentences.[7]

Despite Congress' intent that the Guidelines should allow a court the option of imposing probation for minor non-violent offenses committed by first offenders, respondent speculates that in drafting § 2Q1.3, the Commission responded to Congress' February 1987 increase of the maximum sentence under the Clean Water Act. Opp. 16. This is an unlikely scenario as the draft Guidelines were issued in January 1987. The respondent also speculates that the Commission responded to the EPA which allegedly "told the Commission that more stringent sentences were needed for environmental offenses." *Id.* While the respondent claims that

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[7] *See* Sentencing Guideline Part D-3 **Offenses Involving Drugs-Regulatory Violations**, Section 2D3.1 "Illegal Use of Registration Number to Manufacture, Distribute, Acquire, or Dispense a Controlled Substance." The base offense level for this regulatory crime is 6, with *no* specific offense characteristics. This translates into a sentence of 0 to 6 months. Yet Congress made this discrete drug offense a serious felony punishable up to four years imprisonment, 21 U.S.C. 843(a) (one year *more* than the worst water polluter could ever receive under the Clean Water Act, a law which covers a wide range of conduct). On the other hand, there are environmental statutes whose statutory maximum sentences are 4 months, or one year, and the Guidelines dictate that the maximum be imposed each time, thus transforming the maximum sentence into a mandatory minimum. *See* Brief *Amicus Curiae* of Southeastern Legal Foundation; Pet. 22-24. This flawed "one size fits all" approach peculiar to environmental offenses explains the gross disparity between a probationary sentence available for core offense conduct for a serious regulatory drug offense that has a four year maximum sentence (21 U.S.C. 843(a)) and a mandatory minimum of two years or more for a minor regulatory offense such as petitioner's that is far removed from the core offense conduct of water pollution.

the Commission had some sentencing data, it has not denied petitioner's contention (Pet. 24) that the Commission failed to "ascertain the average sentences imposed" in the environmental category as required by 28 U.S.C. 994(m) before it so markedly deviated from that past sentencing practice.

The respondent's reference to the Commission's vague and generic explanation in the introduction of the Sentencing Guidelines for departing from past sentencing practices, Opp. 16, hardly suffices as a reasoned explanation for the Commission's radical departure in setting the sentences for *environmental* offenses.[8]

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[8] Inasmuch as the Sentencing Commission is not a party to this action and is within the judicial branch, the respondent's resort to speculation as to what the Commission did or did not do is understandable, unlike those cases in which it defends similar challenges to executive branch and "independent" agencies' regulations. *Cf. Geraghty v. U.S. Parole Com'n*, 719 F.2d 1199 (3d. Cir. 1983) (challenge to certain Parole Commission guidelines). Accordingly, the Court may wish to hold this question in abeyance and invite the Commission to express its views on this important issue as an *amicus curiae*.